No. 12204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WALTER FIELDS and ADEL C. SMITH,

Appellants,

vs.

HARRIET V. FIELDS,

Appellee.

BRIEF FOR APPELLEE, HARRIET V. FIELDS.

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Jurisdiction.

Plaintiff, a Pennsylvania corporation, brought an interpleader action. Defendants therein and appellants here, Walter Fields and Adel C. Smith, are residents of New Jersey. Defendant therein and appellee here, Harriet V. Fields, is a resident of California. By an appropriate order of the District Court these defendants were required to interplead. Federal jurisdiction rested upon the diversity of citizenship of the parties.

28 U. S. C. A. Sec. 41, Judicial Code.

Nature of the Case.

W. C. Fields died in California December 25, 1946. On March 8, 1934, he purchased from plaintiff and paid for a single premium policy of life insurance upon his own life.

After his death plaintiff paid one-half of the death benefit under said policy to the appellants, Walter Fields and Adel C. Smith, whom the insured had designated the beneficiaries. Plaintiff then filed this interpleader action, deposited the remaining one-half of the death benefit in the registry, and trial was had between all defendants. The main issue at the trial was whether the insured had paid the insurance premium without his wife's consent from community property. The District Court made findings that he did. The portions thereof involved in this appeal are:

> "V.
>
> "It is true that the earnings and, consequently, the money paid for the annuity insurance contract were the community property of William Claude Fields and Harriet V. Fields.
>
> "VI.
>
> "It is true that the payment of the sum of $26,500 for the insurance contract, the proceeds of which were to be paid to Walter Fields and Adel C. Smith, on March 8, 1934, was a gift of the community property of William Claude Fields and Harriet V. Fields." [Clk. Tr. 58.]

The pertinent statutes are Civil Code Section 163, Civil Code Section 164 and Civil Code Section 172.[1]

Questions Involved in the Appeal.

Appellants concede "the sole question involved here is the character of the earnings of William C. Fields, from which this policy premium was paid."

The "sole question" may be amplified, "Was the premium on the life policy in question paid by William C. Fields from the community earnings of himself and Harriet V. Fields, his wife?"

Involved in the question is this sub-question:

> Did appellee (wife of decedent) waive her rights in community property by a separation agreement made and fully executed in New York, or by a relinquishment of her community property rights made by her prior to the payment of the premium on the life policy in suit?

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[1]"§163. Separate property of the husband. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." (Enacted 1872.)

"§164. Property acquired after marriage. All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; * * *."

"§172. Management of community personal property. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community property, without the written consent of the wife." (Amendment 1917, p. 829.)

Synopsis of Argument of Appellee.

There is ample evidence that decedent was domiciled in California at the time he earned the money paid as the insurance premium. It is doubtful whether there is any real conflict of evidence on this point, but if there is, the resolving of that conflict was exclusively the trial court's duty.

There is no evidence that appellee waived her rights in the community property of appellee and decedent, either by a separation agreement made and fully executed in New York, or otherwise.

If there is any evidence consistent with appellants' theory in this regard, it is in direct conflict with positive evidence which supports the findings of the District Court. The law is that the facts before this Court are those determined by the court below. The only possible way to attack the findings successfully is by showing that there was no substantial evidence to support the findings. This has not been and cannot be done.

This Court will not weigh conflicting evidence.[2]

In reliance upon this rule we do not here reargue the comparative weight of the evidence nor attempt to gauge

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[2](From Rule 52A.) "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness."

"Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial Court supported its judgment. *To review the evidence, was beyond the competency of this Court.*" *State Farm Insurance v. Coughran,* 303 U. S. 485, at 487. "* * * these findings *are supported by evidence and hence are accepted by us as*

the credibility of the witnesses. Appellee's argument will be submitted under the following titles:

I.

There Is Substantial Evidence Which Supports the Finding,

> "It is true that the earnings and, consequently, the money paid for the annuity insurance contract were the community property of William Claude Fields and Harriet V. Fields." (Finding V.)

Our argument under that title also applies to the companion finding,

> "It is true that the payment of the sum of $26,500 for the insurance contract, the proceeds of which were to be paid to Walter Fields and Adel C. Smith, on March 8, 1934, was a gift from the community property of William Claude Fields and Harriet V. Fields." (Finding VI.)

II.

There Was No Agreement by Which Appellee Waived Her Community Property Rights.

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correct." Montgomery v. Lamberson, 144 F. 2d 97 (C. C. A. 9, 1944). (Emphasis supplied.)

"We have only to determine whether the finding of the trial court is clearly erroneous. The finding is not clearly erroneous if there is substantial evidence to support it. We consider only the evidence that supports the Court's finding. We do not weigh the evidence or resolve conflicts therein, or consider here the credibility of the witnesses." *Fox River Corp. v. U. S.,* 165 F. 2d 639 (C. C. A. 7, 1948).

See also *Cherry-Burrell Co. v. Thatcher,* 107 F. 2d 65, at 69 (C. C. A. 9, 1939); *Gates v. General Casualty,* 120 F. 2d 925 (C. C. A. 9, 1941); *Augustine v. Bowles,* 149 F. 2d 93 (C. C. A. 9, 1945).

I.

It Is True That the Earnings and, Consequently, the Money Paid for the Annuity Insurance Contract Were the Community Property of William Claude Fields and Harriet V. Fields.

Appellants, at page 4 of their brief concede that there was a conflict in the evidence upon the subject of decedent's domicile.

It was stipulated that decedent was physically present in California at most if not at all times between April, 1931 and the date of his death, December 25, 1946. [Rep. Tr. 15.]

Appellee and decedent intermarried during 1900 in California. [Rep. Tr. 5.] Thereafter they traveled abroad. A child was born to them in 1904. About 1907 decedent abandoned appellee. [Rep. Tr. 6.] Decedent was an actor and traveled considerably. He reopened an old bank account in California April 19, 1931. The insurance premium in question was paid therefrom. [Rep. Tr. 27-28.] Decedent worked in California for a motion picture producer, beginning September 19, 1931. [Rep. Tr. 31.] He worked in California for another motion picture producer for the year 1932 continuously through the year 1936. [Rep. Tr. 36.] (There is no dispute that the premium was paid March 8, 1934.)

During 1931 he went to a real estate broker in North Hollywood [Rep. Tr. 80] and leased a furnished house in North Hollywood for one year. He overstayed the lease term for about six months. [Rep. Tr. 80.] He told the broker he had a desire to build a house, and looked at vacant residential property. [Rep. Tr. 81.]

In 1933 he appeared at a voting place in North Hollywood. [Rep. Tr. 83.] The landlord of the premises was present in a room adjacent to the room used for voting. [Rep. Tr. 84.] He saw decedent in the reception room enter the place where voting was being done while voting was in progress. [Rep. Tr. 85.] On that occasion the witness asked decedent to sign his autograph book. Decedent did so. [Rep. Tr. 86.] The entry was undated but immediately followed the autograph of another person which bore the date June 6, 1933. [Rep. Tr. 87.]

A member of the election board which functioned at that address saw decedent cast his ballot at that place. She had been on the election board since 1930 and knows that the ballot was cast toward the beginning of her tenure. [Rep. Tr. 92-96.] (A municipal election was held June 6, 1933.)

Decedent was appointed a Special Deputy Sheriff of Los Angeles County. In connection with his application papers, he answered certain questions over his signature. The application, dated September 1, 1934, contained the query, "Are you now a registered voter?" His answer was "Yes." [Rep. Tr. 97-98.] The statement was under oath. It also contained a Van Nuys, California, address as the residence of decedent. [Rep. Tr. 98-99.] Upon said application a sheriff's deputy badge was issued decedent. [Rep. Tr. 98.]

Of this evidence, the District Court said, in *Penn Mutual v. Fields*, 81 Fed. Supp. 54, at page 59, commenting as follows:

> "* * * As no one may vote in California without registering, after acquiring a legal domicile, and, as the presumption of legality attaches to the act of

every person, it must be assumed that W. C. Fields complied with the law and registered as a condition precedent to voting. * * * But the facts just alluded to prove registration. This, under California law, implies an intention to reside permanently."

In *Toff v. Goodman,* 41 Cal. App. 2d 771, it was said:

"Of all the formal acts to be scrutinized in ascertaining a person's domicile, undoubtedly the act of registering and voting is the most important, and while not necessarily conclusive, it is usually most convincing and persuasive."

In 1932 decedent wrote to a New York bank as follows:

"Find key to my safe deposit box 131. Will you kindly seal the contents of the box in an envelope and send it to me registered mail or American Express. I will discontinue the use of the box as I am almost permanently settled here in California." [Rep. Tr. 105, Ex. Q.]

He opened a bank account in Hollywood during June, 1927. [Rep. Tr. 107, Ex. B.]

His earnings thereafter were traced into the account, and into the full payment of the premium on the policy in litigation. [Rep. Tr. 107-111 and 57-72, Ex. A and A 1; Rep. Tr. 48-55, Exs. J, K, L, E, F, G 1, 2, 3, 4, 5; Rep. Tr. 29-40.]

In 1927 decedent joined the Automobile Club of California and gave a North Hollywood address. He kept the membership in good standing throughout the rest of his

life. [Rep. Tr. 40.] He was a member of the Masquers Club in Hollywood, from 1931 to 1937. He gave a local address in his application. [Rep. Tr. 42.] The membership of the Club is divided into "residence" and "non-residence." Decedent held a resident membership. [Rep. Tr. 41.]

He applied for a Class "A" membership in the Screen Actors' Guild November 13, 1933. [Rep. Tr. 45.]

On June 4, 1933, he resigned from the New York Athletic Club. In the letter of resignation he said:

> "Will you please accept my resignation and send me a bill for my indebtedness to date. My reason for resigning is that *I have taken up my residence in California and intend to remain here.*" (Emphasis supplied.) [Ex. P.]

Appellants relied heavily upon the fact that decedent's Federal income tax returns during the period showed his address as "Waterford Works, New Jersey." This creates no conflict for the law did not require the use of a domiciliary address on such returns until 1937.[3] Commencing in that year decedent gave his California address in said returns.

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[3] *In re Gilbert's Estate,* 15 A. 2d 111 (a New Jersey case), was one in which a like declaration of address in a tax return was urged as evidence of domicile. The Court pointed out that until the year 1937, it was not necessary under the Income Tax law to give one's actual address in a tax return and that as the only requirement was that an address to which mail could be sent the taxpayer, *no inference of domicile could arise from the giving of an address in a tax return.* This comment is at page 113 of the reported decision.

His actions show that he was acquainted with the rule set forth in *Gilbert's Estate,* 15 A. 2d 111, because when he came to distinguish between a mail address and domicile, he classified the Waterford Works entry as a permanent mail address and his relation to California as domicile.

In a petition, sworn to on August 22, 1939, filed before the United States Board of Tax Appeals, involving taxes for the years 1933, 1934, 1935 and 1936, and asking a re-examination of a deficiency assessed on June 10, 1939, W. C. Fields claimed domicile in California for the years 1933 and 1934. This sworn statement read:

> "During the period involved in this appeal, *petitioner was domiciled in California, but maintained as a permanent mail address, 'R. F. D. #1, Waterford Works, New Jersey.' During the year 1933 and until October, 1934, he rented a home located at 9950 Toluca Lake Avenue, North Hollywood, California, which was used both as an office and a residence. In October, 1934, he rented a house at 4704 White Oaks Avenue, Encino, California, which, likewise, was used during the ensuing two years both as an office and a residence.* During this entire period and for many years prior thereto, he was separated from and not living with his wife, Hattie Fields." (Emphasis added.)

This verified statement is not a casual claim of domicile, but one buttressed with facts showing occupancy of premises in California, for residential and business purposes, under long leaseholds, with an explanatory refer-

ence to the separation from appellee, Harriet V. Fields. The abandonment of the defense based on such claim does not wipe out the assertion as an admission against the present contention made on behalf of the decedent. *Domicile is acquired by "residence in fact, coupled with the purpose to make the place or residence one's home."* (*State of Texas v. State of Florida,* 306 U. S. 398.)

From a combination of the residence in fact and the intent, there springs a condition or status known as Domicile. One's acquired domicile is retained until a new domicile is acquired. (*De Young v. De Young,* 27 Cal. 2d 521.)

The foregoing is part of the evidence of California domicile in the critical period. We have not exhausted it. Appellants recognize its sufficiency by this statement in their brief, "We, on this appeal realize that this Court would probably not disturb this finding of the trial Court." (Opening Brief 4.)

The pertinent evidence is carefully analyzed in the Opinion of the District Court which is reported in 81 Fed. Supp. 54-62.

It follows that decedent's earnings, which were transmuted into an insurance benefit were community property unless the wife had entered into a valid agreement with decedent to the contrary.

II.

There Was No Agreement by Which the Wife Waived Her Community Property Rights.

In addition to arguing that decedent was not domiciled in California during the pertinent years, appellants tried their case in the District Court on the theory that appellee had made an agreement with decedent. That asserted, but non-existent, agreement supposedly bartered away her right in the community property.

The findings are otherwise.

Appellants' position is that there was a conflict in the evidence. They ask this Court to reperform the exclusive function of the trial court and apply the tests of credibility; weigh the conflicting statements, and determine where the preponderance of evidence lies. Such a contention misconceives the respective duties of trial and appellate courts. If we consider their shifted contention to be that there is not any conflict, it is made in the face of the affirmative testimony of appellee who testified that there never was an agreement between her and decedent. The evidence, therefore, is against appellants.

Testimony which supports the District Court in this regard is summarized thus:

> The marriage remained intact. [Rep. Tr. 26, lines 3-25.] There was no property settlement agreement. [Rep. Tr. 217.] The wife took what decedent gave her for support. This was sometimes as little as $25.00 per week. [Rep. Tr. 217.] For almost three years it was $75.00 per week. [Rep. Tr. 218.] In 1933 he provided her with $50.00 per week. [Rep. Tr. 218.] Then he increased it to $60.00. [Rep. Tr. 218.] She supported the child of the marriage from

these monies. [Rep. Tr. 219.] At one time he gave her "$25.00 a week, and then $30.00 another time, and then $35.00, and then he cut (her) down again, and then it was $40 and then $60.00. [Rep. Tr. 221.] * * *" "There was no arrangement. He just sent it to me." [Rep. Tr. 221.]

Appellants urged a number of letters upon the Court. Appellee was questioned about them. They were examined by the Court. Appellants thought so little of them that but few were put in evidence. On the motion to reopen the case, more letters were produced and appellee examined concerning them.

Counsel requested and was granted permission to file a purported digest of the letters. It is now contended that this digest was received in evidence. This is not true.[1] The record shows that it was filed and treated as a memorandum. It was not offered in evidence. It would be clearly inadmissible as evidence for the letters themselves were available and the witness actually questioned about them. The District Court saw them and, in its Supplemental Opinion, the Trial Judge said at 81 Fed. Supp. 54:

"* * * The statements in the widow's letters relating to receipts of moneys over a period of years (from 1914 to 1944), which are summarized in the digest of letters filed with the motions and as to which she was examined orally at the hearing, *are nothing*

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[1]Referring to the letters digested, the Court said: "Two of these are already in evidence."

Referring to the extract of correspondence, the Court said: "It may be filed." [Rep. Tr. 7, proceedings November 22, 1948.] This is the same language which was used on the same page with respect to the filing of a memorandum of authorities. There was no offer in evidence. The purported "extract of the correspondence between the parties" was not given an exhibit number.

more than acknowledgments of receipts of various sums of money. Their tone is, at times, sarcastic and the answering letters of the deceased, to which the digest refers, are similar in spirit. On the whole, they are of the same type as the letters which were before the court at the trial of the case. *They show, only, as did her testimony at the trial, that the wife, at various times, took, for her support, the amounts which the deceased, in his lifetime, gave her, increasing them or reducing them as he willed, she at times protesting, at others acquiescing.* THEY DO NOT TEND TO PROVE AN AGREEMENT TO ACCEPT THE WEEKLY PAYMENTS IN LIEU OF HER WIDOW'S RIGHT TO CLAIM PERSONAL PROPERTY FROM FIELDS' ESTATE." (Emphasis supplied.)

A concession was made in the following colloquy in open court:

"Mr. Herron: Mrs. Fields is here in the courtroom today. *She tells me that she never did enter into any property settlement agreement* and she does not have such an agreement in her possession.

Mr. Preston: How about the contract executed at the hospital?

Mr. Herron: *And* there was no contract executed at the hospital. She is here and available as a witness.

Mr. Preston: *Your word is good.*" (Emphasis supplied.)

Pursuit of the search for an agreement dissipated the case and left it barren, but counsel's imagination had been fixed. He read the letters. From the language of simple letters of a considerate and needy wife to her husband, non-existent property settlement agreements are imagined. With a show of laborious profundity, these imaginations are unsuccessfully scanned to produce the terms of some firm agreement.

At the trial appellee testified that there was never any understanding as to what her support would be. [Rep. Tr. 9.] They did not have an agreement. [Rep. Tr. 9.]

On the hearing of the motion to reopen, appellee testified that "There never was any agreement." [Rep. Tr. 32—Nov. 22nd.] "The weekly remittance was what he allowed me at that time. He changed. He went up and down later on." [Rep. Tr. 33—Nov. 22nd.] "I would have to take what was given me." [Rep. Tr. 33—Nov. 22nd.] At one time he cut her to $50.00; and wrote "prospects are more effulgent. You are not going to suffer very long until you are back on $75.00 again." [Rep. Tr. 35—Nov. 22nd.] He never restored her to $75.00 per week. [Rep. Tr. 36—Nov. 22nd.] Before he died he cut her to $40.00 per week. [Rep. Tr. 37—Nov. 22nd.]

From 1933 to November, 1946, the weekly allowance was $60.00 a week. She protested and as always he made excuses, exaggerations, untruths and denials. [Rep. Tr. 37—Nov. 22nd.] She "didn't know when he was going to cut me because there was no stipulated agreement at any time and he cut me and raised me as he wanted to." [Rep. Tr. 38—Nov. 22nd.] There was no promise to support. her. He just did support her "in a small way." [Rep. Tr. 38—Nov. 22nd.] When he left home and they quit living together he did not say anything about supporting her. He just kept on giving her $25.00 or $30.00 or $35.00 and then down to $25.00 again." [Rep. Tr. 38—Nov. 22nd.]

The word "agreement" appears only once in the extensive correspondence used by appellants' counsel in his extended examination. [Rep. Tr. 11, line 20; Rep. Tr. 45—Nov. 22nd.] *That one use of the word was in a letter written by decedent to appellee. She did not answer it.*

[Rep. Tr. 40—Nov. 22nd.] "I never answered his letter because it was so small and cheap. * * * He waited for my answer and I never answered him." Concerning the money decedent sent her, she "would from time to time write him and beg him for more, and sometimes * * * get it, but more often not." [Rep. Tr. 45—Nov. 22nd.]

Appellants, at the hearing on the motion (through counsel) stated this point to be:

> "My point is that the law is that there could not be any acquisition of property rights in California, even though he moved here, *when he was supporting her and paying what she accepted as support.*" [Rep. Tr. 48—Nov. 22nd.]

It is apparent that appellants did not produce even a *prima facie* case that appellee waived her rights by the terms of any agreement. However, as against the bare contention that she did so, she has produced her sworn denial that there was ever any definite understanding.

This denial, tested by and fully explained in extensive cross-examination both at the trial and hearing on the motion, to reopen resulted in submission of the question upon a record which shows mere argument on one side, opposed to evidence on the other. The Court accepted the evidence. Even had the total absence of any evidence of an agreement been remedied, the wife would not be bound to such a contract because when husband and wife contract, the husband must regard the fact that he is a fiduciary.

> "The relations between husband and wife are declared to be confidential and all transactions between them respecting property are made subject to the same rules that control transactions between a trustee and his *cestui que trust.*"
>
> *Jackson v. Jackson,* 94 Cal. 446.

Property settlements between husband and wife are:

> "* * * subject 'to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts."
>
> *Norris v. Norris,* 50 Cal. App. 2d 726, at 733.

The title on trusts in the Civil Code provides in Section 2228:

> "* * * In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

No proof was offered that he obeyed the rule. Counsel contends that the alleged agreement was entered into in New York. (Op. Br. p. 9.)

New York law is not different in this respect from the familiar California rules. See *In Matter of Brykczynski,* 81 N. Y. S. 2d 61. The Court dealt with a case wherein a husband seeking to limit his wife's share in his estate, had asked her to execute a waiver of her right to certain corporate stock. Prentice-Hall summarizes the holding:

> *"Full disclosure of all the facts would seem to be necessary prerequisite* of a valid waiver. But *full disclosure itself may not be enough if a wife inexperienced in business affairs and faced with a complicated settlement cannot evaluate the facts disclosed.* In such a case, *there should be present on her behalf a lawyer or other qualified representative who can advise her and otherwise protect her interests."* (Emphasis supplied.)

There is no evidence at all that meets these tests. Appellants have entirely failed to show that there was full disclosure of all the facts.

Despite the inability of counsel to state the full terms of the alleged agreement, it is his contention that one of its provisions was the waiver by the widow of all interest in decedent's earnings. Such a waiver, if actually made, would have been one under which decedent would have gained a very substantial advantage.

In *White v. Warren,* 120 Cal. 322, it was said:

> "All transactions between husband and wife, by which one obtains *any advantage* from the other, are presumed to be entered into by the latter without consideration and under undue influence. * * *." (Emphasis supplied.)

In *Gaines v. Calif. Trust Co.,* 48 Cal. App. 2d 709, this language appears:

> "* * * the agreement was drafted at the direction of the deceased and executed by the widow *at his instigation* * * * *without any disclosure by him to her* of the then value and character of his estate or of the rights which she was called upon to surrender by the agreement. Accepting the agreement in the belief that the deceased was dealing honestly with her, she was justified in resting in that belief, and was not called upon then or thereafter to make independent inquiry . . . *it was the duty of the defendant to overcome the statutory presumption* of lack of sufficient consideration *and the exercise of undue influence.*" (Emphasis supplied.)

Decedent was the fiduciary who allegedly obtained the advantage in the supposed agreement. It was appellants' burden to show that the circumstances of making the agreement were fair and in all respects met the requirements of law. The evidence is destitute of any such suggestion. It was appellants' burden. They did not attempt to carry it. The widow never had legal advice.

There is no suggestion in the record that the widow took counsel at any time, on any phase of her relations with decedent. Counsel contends that the alleged agreement was entered into in New York. The law of New York in this respect is stated in *Wolf v. Wolf,* 34 Atl. 152 (N. J.). After observing that the laws of New York and New Jersey are the same in this field, the Court said:

> "Taking up the special defense, the first question presented for determination is whether the separation agreement in itself constitutes a defense to this suit . . . it does not, for a number of reasons. For one thing it was executed by complainant without independent advice."

The failure to provide the wife with independent legal advice *in re* the agreement was also a ground of reversal in *Matassa v. Matassa,* 87 A. C. A. 276.

There Is No Showing of a Specific Term of the Alleged Agreement Whereby Any of the Widow's Rights Are Specifically Waived.

In re Griffith's Will, 3 N. Y. S. 2d 926, at 927, the law is stated this way:

> "* * * 'the agreement between the parties cannot be regarded as a waiver of any of their legal rights beyond the express terms thereof,' Jardine v. O'Hare, 66 Misc. 33, 34, 122 N. Y. S. 463, 464.
>
> "This rule has been approved, in effect, by our Court of Appeals (Matter of Burridge's Estate, 261 N. Y. 225, 229, 185 N. E. 81), where it cites Girard v. Girard, 29 N. M. 189, 221 P. 801, 804, 35 A. L. R. 1493. The official syllabus of the decision last cited states:
>
> " 'In the construction of contracts, where it is sought to deprive either husband or wife of property rights growing out of the marital relation, courts will go no further than the language of the contract extends, and *will not deprive either spouse of such rights unless there is a clear and unmistakable* intention to barter them away." (Emphasis supplied.)

Appellants have not offered any evidence of any clear and unmistakable intention on the part of the widow to barter away any of her rights.

With respect to a written agreement between husband and wife, it was said in *Matassa v. Matassa, supra:*

> " 'It is not disputed that husband and wife may by appropriate agreement waive their respective inheritable rights in the estate of the other. It is equally well established, however, that the courts will not construe a property settlement between husband and wife as depriving the survivor of inheritance or other

rights growing out of the marital relation, except where there is a clear and unmistakable intention to barter away such rights. The agreement before us seems to be, as stated therein, 'A property settlement between the parties, settling everything including community property.' It also contains a mutual release of 'alimony and any and all money demands that one could make against the other of any kind whatsoever.' *There is no release in terms by either one* of claims upon the future acquisition of the other, *nor, in terms, any release* by either one upon the estate of the other in case of death. * * * In Jones v. Lamond, 118 Cal. 499, 502, 50 P. 766, 767, 62 Am. St. Rep. 251, it is said: *'We do not think the courts should come to the aid of these contracts so as to deprive either the husband or wife of the property rights growing out of the marriage relation, except 'where there is a clear and unmistakable intention to barter away such rights.'"* (Emphasis supplied.)

The law is set out in *In re Dow's Estate,* 91 A. C. A. 501:

> "As said in Re Estate of Gould, 181 Cal. 11, 14, 183 P. 146, 147: 'An examination of the cases wherein it has been held that the wife had waived her statutory rights as widow reveals the fact that in each case the words used clearly imported an intention to surrender the very right afterwards claimed.' * * *."

The District Court, in considering the evidence, applied the above law. See *Penn Mutual v. Fields,* 81 Fed. Supp. 54, at 62:

> "Much less do they (the letters) disclose any understanding that they were to continue during the lifetime of the widow. In brief, they fail to comply with

the essential requirements of such contracts as set forth in the very cases relied on by the movants. See especially, the language of the court in Re Burridge's Estate, 1933, 261 N. Y. 225, 185 N. E. 81, at page 82.

"As succinctly put elsewhere: *'To constitute a postnuptial settlement, the act creating it must be clear and unequivocal.'* 41 C. J. S., Husband and wife, §89, page 562. (Emphasis added.) * * *."

Conclusion.

It is respectfully submitted that the findings of the District Court are sustained by the evidence and that the judgment should be affirmed.

Respectfully submitted,

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